

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

**DEFENDANTS' MOTION TO DISMISS COUNTS IX, X, XII,
AND XV OF PLAINTIFFS' THIRD AMENDED COMPLAINT**

Defendants City of Chicago (the “City”), Mayor Rahm Emanuel, Superintendent of Policy Gerry McCarthy, and City Clerk Susana Mendoza (collectively, “Defendants”), by their counsel, Stephen R. Patton, Corporation Counsel of the City of Chicago, hereby moves this Court pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss Counts IX, X, XII, and XV of the Third Amended Complaint (“Complaint” or “Compl.”) filed by Plaintiffs Second Amendment Arms (“SAA”), R. Joseph Franzese, Robert M. Zieman, Icarry, Shaun A. Kranish, and Tony Kole (collectively, “Plaintiffs”). In support of their motion, Defendants state as follows:

1. The instant lawsuit challenges the City’s efforts to regulate firearms within the City on various grounds. After this Court ordered Plaintiffs to clarify these grounds on three separate occasions, Plaintiffs filed the current version of the Complaint.

2. As set forth more fully in Defendants’ Memorandum of Law in Support of Their Motion to Dismiss Counts IX, X, XII, and XV of Plaintiffs’ Third Amended Complaint, which Defendants incorporate as if set forth fully herein, four of the counts alleged in the Complaint fail to state a valid claim and should be dismissed.

3 Count IX of the Complaint alleges that the current version of the City's firearm ordinance, which prohibits the sale, transfer, and purchase of firearms within City limits, violates Plaintiffs' substantive due process rights, but the Supreme Court has repeatedly held that where a constitutional claim is covered by a specific constitutional provision, that provision, and not the more generalized notion of substantive due process, must be the guide for analyzing the claim. The Court should therefore review challenges to the City's ordinance under the Second Amendment, which Plaintiffs cite as the basis for nearly every other count in their Complaint, not the Substantive Due Process Clause of the Fourteenth Amendment.

4. Count X alleges that the current version of the City's ordinance also violates the Dormant Commerce Clause, but Seventh Circuit precedent affirms that non-discriminatory local laws such as the City's current firearms ordinance do not run afoul of the Dormant Commerce Clause.

5. Counts XII and XV seek to recover, on behalf of Plaintiff Zieman and a putative class, the firearms (or value of the firearms) seized by the City pursuant to a former version of the firearms ordinance that banned possession of certain firearms altogether. Plaintiffs allege these claims under 42 U.S.C. § 1983 and Illinois unjust enrichment law, which have two- and five-year statute of limitations, respectively, but Plaintiffs do not allege when the firearms were seized. Court documents publicly filed with the Circuit Court of Cook County in the legal action enforcing the City's ordinance against Zieman readily demonstrate that the City seized his firearms in 2001, which is approximately nine years before the instant lawsuit was filed. Defendants respectfully ask the Court to take judicial notice of this fact and dismiss Counts XII and XV as time-barred.

WHEREFORE, Defendants respectfully request that this Court dismiss Counts IX, X, XII, and XV of the Complaint pursuant to Fed. R. Civ. P. 12(b)(6) and grant Defendants such further relief as the Court deems just and proper.

Dated: November 15, 2013

Respectfully submitted,

STEVEN R. PATTON,
Corporation Counsel, City of Chicago

BY: /s/ David M. Baron
Assistant Corporation Counsel

Mardell Nereim
William Macy Aguiar
David M. Baron
City of Chicago, Department of Law
Constitutional and Commercial Litigation Division
30 North LaSalle Street, Suite 1230
Chicago, Illinois 60602
(312) 744-6975 / 744-4216

Attorneys for Defendants